

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVE SANDS,

Plaintiff,

-against-

CBS INTERACTIVE INC.,

Defendant.

Case No. 18-cv-07345 (JSR)

ECF Case

DECLARATION OF ELEANOR M. LACKMAN IN OPPOSITION

ELEANOR M. LACKMAN declares as follows:

1. I am a member of the Bar of this Court and a partner in the law firm of Cowan, DeBaets, Abrahams & Sheppard LLP, attorneys for defendant CBS Interactive Inc. (“CBSi”) in this proceeding. I submit this declaration in support of CBSi’s opposition to Plaintiff Steve Sands’ (“Plaintiff” or “Sands”) motion (“Motion”), pursuant to Federal Rule of Civil Procedure 56, for summary judgment against CBSi.

2. On January 10, 2019, I took the deposition of Plaintiff. Attached hereto as **Exhibit A** is a true and correct copy of excerpts of the transcript of that deposition.

3. Attached hereto as **Exhibit B** is a true and correct copy of correspondence between Sands’ counsel, Richard Liebowitz, and CBSi’s counsel, dated January 31, 2017 wherein Mr. Liebowitz agreed to withdraw a copyright infringement lawsuit instituted by Sands against CBSi regarding the use of a photograph, apparently conceding that CBSi properly licensed the photograph at issue.

4. Attached hereto as **Exhibit C** is a true and correct copy of relevant excerpts from CBSi’s First Set of Requests for the Production of Documents, dated September 28, 2018.

5. Attached hereto as **Exhibit D** is a true and correct copy of correspondence regarding the production of documents Bates-stamped SANDS_0960-0961.

6. Attached hereto as **Exhibit E** is a true and correct copy of internal emails from Netflix, Inc. relating to Plaintiff and the series *Iron Fist*.

7. Attached hereto as **Exhibit F** is a true and correct copy of the article entitled “A Daredevil Series Character Appears on the Punisher Set” along with two individual pages in the “gallery view” that appeared at the URL <https://www.comingsoon.net>, as it currently appears on the website (the “Current ComingSoon.net”). Attached hereto as **Exhibit F-1** is a true and correct copy of the first page of the article annexed to the Declaration of Steve Sands as Exhibit G, entitled: “Jon Bernthal Starts Filming Marvel’s The Punisher,” which demonstrates that it was first published on October 3, 2016.

8. As is evident from Exhibit F, which shows that one of the photographs in the gallery view is dated April 2017, the article has been updated since its original publication in October 2016.

9. Attached hereto as **Exhibit G** are true and correct copies of screenshots of photographs on ComingSoon.net that do not include any copyright management information (“CMI”), which show that it is customary for the website to not credit photographers.

10. A comparison of the Current ComingSoon.net and CBSi’s use of the Photographs conclusively demonstrates that CBSi could not have possibly sourced the photographs from any version of the ComingSoon.net article with credit to Sands. Attached hereto as **Exhibit H** is a true and correct copy of a close-up comparison of the two uses.

11. As shown in Exhibit H, and as I advised Sands’ counsel, had the original ComingSoon.net Article contained the CMI as it appears now, in the Current ComingSoon

Screenshot, CBSi would not have been able to use the Photographs as they appeared in 2016 on GameSpot, because the CMI text would have run across the bottom of the Photographs.

12. On January 11, 2019, the day after the deposition and the day Sands' counsel first raised the theory, I advised Sands' counsel as follows:

If you compare our photographs (attached hereto for ease of reference) with the photographs that are live today on comingsoon.net, you'll see that gamespot.com couldn't have possibly used the version of the photographs currently available on comingsoon.net. First, the site now is an html file. You can't right-click it and get the photo. Second, compare comingsoon.net's current display, <https://www.comingsoon.net/tv/news/773867-a-daredevil-series-character-appears-on-the-punisher-set?slideshow=129885#/slide/54>, with CBSI000004. Look at the bottom of Deborah Ann Woll's boot. The comingsoon.net credit to Sands is covering her boot on the live version. In the gamespot.com photo you can see her entire boot. It's just not possible, and frankly, it's a waste of both the parties' time to devote energy to your knee-jerk theory. The remnants of comingsoon.net's old design are still apparent; some of the photographs contain the watermark, some do not.

(emphasis in original).

13. Attached hereto as **Exhibit I** is a true and complete copy of a subpoena served on Evolve Media, LLC by CBSi, dated December 20, 2018.

14. Because the Internet Archive's Wayback Machine does not have records of the Current ComingSoon.net Article in its archives, it is impossible to know how the original article appeared when it was initially published on October 6, 2016. Attached hereto as **Exhibit J** is a true and complete copy of the Internet Archive's Wayback Machine, which shows that the individual "gallery view" pages were not archived.

15. Attached hereto as **Exhibit K** is the GameSpot article at issue in this action.

16. Attached hereto as **Exhibit L** is a true and correct copy of the Getty Images Contributor Agreement between Sands and Getty Images, dated September 19, 2011.

17. Attached hereto as **Exhibit M** is a true and correct copy of a letter from Getty to Sands, dated May 1, 2017, wherein Getty Images terminates its relationship with Sands.

18. Attached hereto as **Exhibit N** is a true and correct copy of an email, dated November 8, 2018, from Sands' counsel attaching a "Sands v. Vice"-labeled PDF (circled in red). Sands' counsel explained to me that when he produces discovery in Sands' cases, it is a "cut-and-paste" job, and he just reuses the same material.

19. My firm undertook significant efforts to subpoena third-parties, such as Backgrid Inc., Evolve Media (*see* Exhibit I), Getty Images, Marvel Entertainment, and Netflix Inc. Sands did not serve any third-party subpoenas.

20. Attached hereto as **Exhibit O** is a true and correct copy of CBSi's Supplemental Disclosures, dated December 26, 2018.

21. Attached hereto as **Exhibit P** is a true and correct copy of Sands' First Set of Requests for Production of Documents, dated September 28, 2018.

22. Attached hereto as **Exhibit Q** is a true and correct copy of Sands' Rule 26(e) Supplemental Disclosures.

23. Notably, 300 pages of Sands' production consisted of printouts of Getty invoices over a three-year span. Yet another 300 pages of Sands' production consisted of printouts from PACER.

24. No documents were provided regarding routine registration practices, nor were documents pertaining to the process of registering the photographs claimed in this case produced prior to Sands' deposition.

25. Moreover, the documents attached as Exhibits C–G to the Halperin Declaration (Dkt. No. 21), filed with Sands' motion for summary judgment, were requested prior to the

deposition of Sands, on January 10, 2019, yet they were not produced until the last day of discovery despite having been accessed (apparently only by a client relations manager at his lawyer's office) two days prior to the deposition.

26. Additionally, Sands never noticed or otherwise took any depositions in this action.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: Los Angeles, California
February 8, 2019



ELEANOR M. LACKMAN